No. 2791

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee, et al.

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, et al.

Appellants,

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, et al.

vs.

AMERICAN WATER WORKS AND ELECTRICAL COMPANY, et al.

Appellees.

(See following two pages for full title.)

Petition of the American Water Works and Electric Company, The Inter-Mountain Electric Company, the Thousand Springs Power Company and Guaranty Trust Company of New York for Rehearing.

Upon Appeals From the United States District Court for the District of Idaho, Southern Division.

WYMAN & WYMAN,

Solicitors for American Water Works and Electric Company, Intermountain Electric Company, The Thousand Springs Power Company, and Guaranty Trust Company of New York.

No. 2791

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913.

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Interveners.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Intervener,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, and WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Defendants, L. M. PLUMER, and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, Interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913.

AMERICAN WATER WORKS AND ELECTRICAL COMPANY, the INTER-MOUNTAIN ELECTRIC COMPANY, THE THOUSAND SPRINGS POWER COMPANY and the GUARANTY TRUST COMPANY OF NEW YORK, GENERAL CREDITORS OF GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY,

Appellants,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, and Interveners, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, and Complainant, EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by Great Shoshone and Twin Falls Water Power Company, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,

Appellees.

Petition of the American Water Works and Electric Company, The Inter-Mountain Electric Company, the Thousand Springs Power Company and Guaranty Trust Company of New York for Rehearing.

Upon Appeals From the United States District Court for the District of Idaho, Southern Division.

To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit.

Your Petitioners, American Water Works and Electric Company, Intermountain Electric Company, The Thousand Springs Power Company, and Guaranty Trust Company of New York, appellants in this cause, do respectfully petition the Honorable Court to grant a re-hearing herein; and in support of their petition they show that error was committed in the decision filed in this cause as follows:

1. That in the consideration of this appeal the

Court has believed its decision should in somewise be affected by the question of laches on the part of the American Water Works and Electric Company, while such matter ought not to have been so considered and for the further reason that the American Water Works and Electric Company was not in fact guilty of laches.

2. That the Court has erred in not considering the appeal allowed these petitioners by this Court and in not passing upon the right of the Receiver to contest the validity of the mortgage herein as presented by that appeal; and in not awarding to the Receiver the fund or property in question that it may be ratably distributed to all creditors of the insolvent corporation.

3. That the Court has not given due effect to the fact that the property in question was in the possession of a Receiver appointed in a general creditors' suit and that such Receiver was made a party to a foreclosure suit affecting the property so in his possession for the purpose of determining to what extent his possession should yield to the superior claim of such mortagee; for upon consideration of these matters it would seem certain that the property not so taken from him by the superior claim of the mortgagee should have been continued in his possession for the benefit of those for whom he held.

4. That the Court has not given due weight to the fact the Special Claimants here had no title to, claim upon or right to the possession of the property

in question, while the Receiver had both such claim and right; and yet the property was taken away from the Receiver and given to the Special Claimants.

5. That the Court by its decision seems to give countenance to the mistaken view that after the appointment of a Receiver in a general creditors' suit, general creditors who have joined therein may by judicial proceedings better their position to the disadvantage of other creditors.

ARGUMENT.

The record upon this appeal, though not particularly long, is nevertheless somewhat confusing and we think the Court has not understood the facts of the case. We therefore undertake to present here a brief and succinct statement of them, believing that thereby the true relationship of the parties as among themselves and to the fund in question will appear quite differently from what the Court has assumed them to be.

The Equitable Trust Company had a mortgage upon all the property of the Great Shoshone and Twin Falls Water Power Company, both real and personal. That mortgage, though in proper form as a mortgage of realty, did not meet in certain respects the requirements of the statutes of Idaho with respect to personal property.

In these circumstances, the Great Shoshone

Company became insolvent and Towle brought a general creditors' suit against it; a Receiver was appointed who took possession of all its property, including the personal property involved here, for the benefit of such creditors of the insolvent corporation as might thereafter join in that proceeding. Notice to creditors was given by the Receiver under the direction of the Court and many creditors, including these petitioners, filed their claims in accordance with that notice. None of the claims so filed were formally allowed until and except as hereinafter shown.

During the progress of the receivership, the Equitable Trust Company commenced its suit to foreclose its mortgage upon all the property of the Great Shoshone Company, which property was in the hands of the Receiver. Proper parties were made defendant to that suit, including the Receiver, who was made a party because, and only because, he was in possession of the property and it was necessary to determine, so far as he was concerned, as to what part of such property he might properly be required to surrender the possession. The receivership in the Towle suit was not extended over the foreclosure suit nor were the two actions consolidated, nor was the mortgage foreclosed in the general creditors' suit as sometimes is done. It is important, we think, to keep in mind the fact that these suits were wholly distinct judicial proceedings.

The foreclosure suit was then brought on for hear-

ing. We cannot better state the situation at this point than to quote from the appellees' brief:

> "At the time this foreclosure case was brought, and practically down to the date of this trial of this foreclosure case, it was supposed by all the creditors that the Equitable Trust Company of New York could take all of the property of the insolvent debtor to satisfy its deed of trust. So general was this supposition among the creditors in the receivership suit that the creditors in the receivership suit had not even taken the trouble to prove their claims in the receivership suit.
>
> "Then, just a few days before the trial in the foreclosure suit, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, from an examination of the bill of complaint, discovered to their agreeable surprise, what no other creditor had found, that there was a defect in the deed of trust and one of the supplemental mortgages, then being foreclosed in this foreclosure suit, to-wit, that the deed of trust and supplemental mortgage though covering personal property which was not a constituent part of a public service corporation's plant and not necessary for the maintenance, operation and repair of said plant, had not been executed with the formalities required by the statutes of the State of Idaho, in which said personal property was situated, in that it did not have the affidavit at the end thereof to the effect that such deed of trust and supplemental mortgage had been given in good faith and without intent to hinder, delay and defraud creditors, and furthermore said instruments had not been filed for record as such instruments covering chattels in the State of Idaho are required by the statutes of Idaho to be filed.
>
> "Thereupon, this claimant immediately called

this discovery to the attention of the other three claimants, the Towle claim, the Hahn claim, and the Shank claim, and upon examination of the pleadings in the foreclosure case found that the Receiver had not set up such defenses on behalf of the creditors and found that the Receiver was in default and had put in no answer whatever. Immediately the McClelland claim was proved in the receivership case, and the three other claimants proved their claims in the receivership case, having first notified the Receiver. These claims were taken up in court, the Receiver and his counsel being present, at the time and place pursuant to due and proper notice and three of the claims were duly allowed and approved by the Court upon the showing then and there made, in the receivership case. Prior to the commencement of the receivership case, the Hahn claim had been reduced to judgment. Immediately after proving their claims, the McClelland claim and the Shank claim petitioned for leave to intervene in the foreclosure suit for the purpose of assailing the lien of the deed of trust and supplemental mortgage * * *

"The Court thereupon allowed the claimant to intervene in the foreclosure suit (the case at bar). The procedure upon the Shank claim was practically the same. These interveners did not delay the trial but filed their answers immediately. As to the Hahn claim and the Towle claim no petition for leave to intervene in the foreclosure suit was necessary because the Equitable Trust Company of New York had made them parties when it filed its bill in the foreclosure suit (the case at bar).

"The parties immediately proceeded to trial in the foreclosure suit. The trial took place in the latter part of October. The Court thereafter rendered its decision (Record, p. 177) in

> the foreclosure suit, giving to the four claimants a prior claim over and above the lien of the deed of trust upon the personal property above described, and ordered that it be sold separately."

It is important to consider, too, that the Receiver had filed an answer in the case in which he specifically asked that only so much of the property in his hands be sold as was covered by the lien of the mortgage. Even if the Receiver's answer were not as full as it might be, it is certain that upon the trial it was conceded to be sufficient to raise the same defence as that raised by the special claimants, for as Judge Dietrich has said in his opinion:

> "By the intervening creditors and by the receiver, it is urged that as to the personal property which the instrument purports to cover, it is void." (tr. pp. 181-2).

It is true creditors other than the special claimants did not intervene or defend in the foreclosure suit, but it is equally true that the Receiver himself did appear and make the defence for them.

If it be asked why the other creditors did not themselves intervene, the sufficient answer would seem to be found in the quotation already given from Appellees' Brief—they did not know that any such defence was available, nor did anyone discover the fact until immediately prior to the trial. But had all credtiors intervened, would the defence have been presented any more effectively than it was?

It is, we think, to put emphasis upon an unimport-

ant circumstance to consider the rights of these petitioners as in anywise affected by the matter of diligence. We have here no race as among creditors to see which may first acquire a lien upon the property. The creditors' suit had put an end to the right of any creditor to obtain a preference by judicial proceeding or otherwise, and the Court has held that the appellees had not obtained any special property right or interest in the property. The Receiver was in possession for the benefit of all and was charged with the duty of protecting the trust. It ought not to be true, that in these circumstances, it was the duty of a creditor who had joined in the creditor's suit by filing its claim, to watch, not the Receiver, but other creditors who had similarly filed their claims, with the view of preventing their obtaining a special advantage in the distribution of the trust fund.

Such being the facts, we think it wholly unnecessary to go into the matter of showing the diligence on the part of the American Water Works and Electric Company in seeking to intervene. It is enough to show that any delay was in nowise through its fault. It tried in every manner possible to it to have its claim approved and its petition to intervene allowed. It is not claimed that the short delay resulting in large measure from the absence of the District Judge from the District injured the appellees or caused them to change their position with respect to the property or fund.

We are not taking the position upon this appeal that the special claimants under the permission of the Court, might not intervene. Indeed, the right to intervene might in some circumstances become exceedingly important, as where the Receiver was not a party to the proceedings or was not properly defending. But what we do contend is, that where such intervention is allowed on the part of a few of the general creditors who had proved their claims in the general creditors' suit, they cannot thereby acquire any special rights or preference over other creditors.

Whatever may have been the prayers of their interventions (and it is not likely they or others similarly situated will not pray for enough), the only relief that they were entitled to was such as might result from the defeating of the lien of the mortgagee upon the mortgaged property. In other words, it is our claim that, having no special interest in the property, and your Honors decide that they have none, all that they might properly have as the result of the defence they and the Receiver jointly urged was that the mortgage should be foreclosed as to part of the property only and that the Receiver might not be dispossessed of such of it as was not covered by the lien of the mortgage. On what ground was the Receiver's prayer denied? When and where did these special claimants acquire an interest in the property adverse to him? And yet without any such interest, by the decree below, not only is the

Equitable Trust Company denied its lien, but the property is taken from the possession of the Receiver himself and given (in effect) wholly and exclusively to certain general creditors of the mortgagee.

In view of the fact the opinion does not refer to the appeals by other claimants than the American Water Works and Electric Company but seems to assume or if not directly to state that none of the other claimants have complained of the action of the Court below, it is not out of place to refer to the supplemental transcript, a part of the record upon these appeals, and particularly to pages four and five thereof, where, under paragraph four, is stated the facts in this respect and the amounts of the several claims of these appellants. It will be seen that these petitioners actually hold a very large part of the total indebtedness of the Great Shoshone Company. and as appears fully from other parts of that transcript have prosecuted an appeal to this Couurt complaining of their unjust exclusion from participation in the fund or property in question here.

We do not ask the Court to consider upon this appeal what special rights these appellants have to the property or fund. They have none. Nor do they claim that they are entitled to any equitable consideration not equally open to every other general creditor of the insolvent corporation whose property is in the hands of a Receiver appointed in a general creditor's suit. But these appellants do ask that

your Honors do consider the matter from the standpoint first of the Receiver and then of the special claimants.

Looking at the question, then, from the Receiver's standpoint, why should this property, not subject to the mortgage, and already in his possession for ratable distribution to all creditors proving their claims, be taken out of his possession and ultimately distributed to but a few of those creditors? Had he not urged the defect in the mortgage and sought to retain the property for the benefit of all creditors? What more could he have done to protect the rights of those whom he represented and for whose protection he had been appointed? The property here in question was in his hands to be preserved by him for the benefit of the creditors of the insolvent corporation and not to be surrendered or given up to anyone who could not show a better title or a superior interest. The mortgagee tried to establish such interest—and failed. On what theory, or in consideration of what superior interest, do the appellees undertake to oust the Receiver from possession and to divest all other creditors of any claim upon the property?

As for appellees, they had no special right in the property and no interest in it not shared by these appellants and we think we may properly ask when and how they became entitled to a preference?

Appellees seem to rest their case almost wholly upon a claim of laches on the part of the American

Water Works and Electric Company, claiming that because it did not discover the defect in the mortgage at as early a date as did they, it thereby lost all interest in the property and had no right to intervene; and this is the view that prevailed in the Court below and the decree has been upheld by this Court. This is, we think, to fail to consider the real question involved upon the appeal and wholly to ignore the appeals presented in the supplemental record. These appeals are not referred to in the opinion of this Court and seem to have been overlooked. Here, we have no question as to the right of intervention or of the discretion of the District Judge in allowing or refusing such intervention. An appeal from the decree itself was allowed certain creditors in the name and stead of the Receiver. It will be remembered that the Court below had refused to allow the Receiver to appeal, but that, after the argument in this Court, the petition having informally been presented before, the appeal of some four creditors having very large claims was allowed here. As we have said, this is in effect an appeal by the Receiver from the decree. It presents the question whether the decree is a proper one wholly separate and distinct from any question as to any right of intervention or of laches; but in doing this we think it does no more than present exactly the same question presented by the appeal of the American Water Works and Electric Company, but it does perhaps present the question in a clearer light and freer from distracting circumstances.

Now, upon the Receiver's appeal, so taken, can it still be said that there is no error in the decree below? As we have before shown, the Receiver made exactly the same defence to the mortgage as did the appellees. The District Judge distinctly so states in his opinion. That defence was made for the purpose of limiting the extent of the lien of the Equitable Trust Company and of preserving for the benefit of the general creditors so much of the property as was not covered by that lien.

This defence was held to be good and a decree in accordance therewith was entered. But the decree went further and took from the Receiver all the property the Court had declared not to be subject to the lien because of and under the defence interposed.

It is of this part of the decree that complaint is made by the appellants whose appeal from the decree in the name and stead of the Receiver was allowed by this Court. As we have already said, this appeal is not embarassed by the consideration of any extraneous question. It presents the single matter of the propriety of so much of the decree below as gave to appellees property in the possession of the Receiver and held by him for the benefit of general creditors.

The property was claimed by the Receiver under a defence held by the District Court to be well founded. While the opinion of the District Judge does not contain any intimation to that effect, the decree can be sustained only upon the theory that

for some reason the Receiver could not make the defence. In answer to any such suggestion we say that the Receiver was made a party to the foreclosure action for the sole reason that he was in possession of the property and represented those for whose benefit he had been appointed and so held and the Court below recognized the fact he was actually interposing the defence to the mortgage.

We respectfully urge upon the Court the consideration of the matters herein set forth. Many of them, and particularly those relating to the appeal last allowed, were apparently not in the mind of the Court when considering the case, and are not adverted to in its decision.

Every unsuccessful litigant is apt to think that the adverse decision creates an unfortunate precedent and his counsel many times shares that view, but after allowing as well as we may for such bias on our own part, we still think it must be true that it would be to interject a disagreeable circumstance into the administration of the estates of insolvent corporations under receivership in creditors' suits, if one set of creditors can by any means secure to themselves an advantage over their fellow creditors in the distribution of the common fund and it will even be more unfortunate, if it be true, that this can be done in or as a result of a judicial proceeding to

which the Receiver is a party defendant and while he is defending for the common good.

Respectfully submitted,

WYMAN & WYMAN,

Solicitors for Petitioner,

American Water Works and Electric Company,
Intermountain Electric Company,
The Thousand Springs Power Company, and
Guaranty Trust Company of New York.

UNITED STATES OF AMERICA,
STATE OF IDAHO,
COUNTY OF ADA.

I, Frank T. Wyman, of Counsel for Petitioners above named, do hereby certify that the foregoing petition is in my judgment well founded and is not interposed for delay.

FRANK T. WYMAN,

Solicitor for Petitioners and of Counsel.